No. 2393

United States
Circuit Court of Appeals
For the Ninth Circuit.

CONSOLIDATED INTERSTATE-CALLAHAN MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

BERTHA D. WITKOUSKI, ET AL,

Defendants in Error.

Supplemental
Transcript of the Record

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE 45042

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In the District Court of the United States for the District of Idaho, Northern Division.

BERTHA D. WITKOUSKI, and CHARLES F. WITKOUSKI and EUGENE D. WITKOUSKI, minors, by Bertha D. Witkouski, their Guardian Ad Litem, Plaintiffs,

vs.

CONSOLIDATED INTERSTATE-CALLAHAN MINING COMPANY, a Corporation, Defendant.

No. 657.

PETITION FOR A NEW TRIAL.

Comes now the defendant above named and petitions the above entitled court to set aside and vacate the verdict rendered by the jury in said cause for the sum of Fifteen Thousand ($15,000.00) Dollars, and the judgment entered thereon, which verdict was rendered on the 25th day of November, 1916, and judgment entered thereon on November 25th, 1916, and to grant a new trial in said cause upon each of the following grounds:

I.

Accident or surprise which ordinary prudence could not have guarded against.

II.

Newly discovered evidence, material for the petitioner herein, which it could not with reasonable diligence have discovered and produced at the trial.

III.

Excessive damages appearing to have been given under the influence of passion and prejudice.

IV.

Insufficiency of the evidence to justify the verdict.

V.

That the verdict is against law.

VI.

Error in law occurring at the trial.

SPECIFICATIONS OF ERRORS IN LAW OCCURRING AT THE TRIAL AND RELIED UPON IN THIS PETITION.

(a) Error of the Court in denying defendant's motion for a non-suit.

(b) Error of the Court in denying defendant's motion to direct a verdict for the defendant which motion was made at the close of all the evidence.

(c) Error of the Court in instructing the jury that whether or not the hoistman Joe Egbert and the hoistman J. H. Litten, or either or both of them, was a fellow servant, or were fellow servants of the deceased, Charles Witkouski, was a question of fact for them to determine under the evidence, and if they found that either or both of said hoistmen were not fellow servants of the deceased, that then they could find a verdict in favor of the plaintiffs.

(d) Error of the Court in instructing the jury that whether or not the proximate cause of the accident to the deceased, (to-wit, the loosening of the nut upon the clutch bolt of the hoist, or the failure to tighten said nut, or both the loosening of, and the

failure to tighten, said nut), was the act or the negligence, or the negligent act, of a fellow servant, or fellow servants, of the deceased, was a question of fact for them to determine under the evidence and that if they found that said act or acts, or negligence of a fellow servant, or fellow servants, of the deceased, was the proximate cause of said accident that then they could find a verdict in favor of the plaintiffs.

(e) Error of the Court in instructing the jury that they might determine under the evidence in this cause whether or not the proximate cause of the accident to the deceased was the act, or acts, or the negligence, of a fellow servant, or fellow servants.

(f) In instructing the jury that they might determine under the evidence in this case whether or not the deceased assumed the risk or risks by reason of which the accident occurred.

SPECIFICATION OF PARTICULARS WHEREIN THE EVIDENCE IS CLAIMED TO BE INSUFFICIENT.

The defendant contends that under the evidence in this case and the charge of the Court it was established by uncontroverted evidence that the proximate cause of the accident to the deceased was the loosening of a nut upon the clutch bolt of the hoist in course of the operation of which the accident occurred, and that said accident was not caused, or contributed to, by any negligence of the defendant in failing to provide the deceased with a reasonably

safe place to work, with reasonably safe tools, appliances, instrumentalities, and machinery, or with reasonably adequate machinery and appliances for the doing of the work in the progress of which the accident occurred, or by its failure to use reasonable care in the inspection of said machinery, appliances and instrumentalities, or to keep said machinery, instrumentalities and appliances in a reasonably safe condition of repair. That there is no evidence that the hoist in use was inadequate, or unsafe for the work in which it was being used, or that it was defective or out of repair; but on the contrary the evidence did disclose that said hoist was adequate, safe and in a reasonably safe condition of repair immediately before said accident, at the time of said accident, immediately after said accident, and so far as the evidence discloses, at all times. That there is no evidence as to how often a hoist of the kind, character and description in use at defendant's mine should be inspected; that there is evidence that said hoist was inspected each day prior to said accident, that it was inspected within from twenty-four to thirty hours immediately preceding said accident; and that there is no evidence that the methods of inspection, or the length of time between which inspections were made, or the length of time preceding the accident within which an inspection was, or inspections were, made were inadequate, insufficient, unreasonable, or not a complete discharge of defendant's duty of reasonable care. That there is no evidence that any reasonable inspection which the defendant was required under

the law to make would have disclosed to it the condition through and by reason of which said accident occurred; but on the contrary the evidence does disclose that unless the defendant had made constant inspections of said hoist, at all times, it could not have prevented said accident. That there is no evidence that any likelihood or probability of the hoistman Litten loosening said nut upon the clutch bolt, or of the hoistmon Egbert, or the hoistman Litten failing to advise the succeeding shift of the fact that he had loosened and failed to tighten said nut, or of the hoistman Egbert operating said hoist without first tightening said nut, would have been discovered by any reasonable inspection at any time when it was the duty of the defendant to inspect, or at any other time prior to the time of said accident. That there is no evidence that there was any negligence on the part of the defendant in the matter of inspection; but on the contrary the evidence does affirmatively show that defendant had fully performed and discharged its entire duty of inspection. That there is no evidence that the defendant's failure to inspect was the proximate cause of the accident. That there is no evidence of any failure on the part of the defendant to repair said hoist or to keep said hoist in a reasonably safe condition; but on the contrary the evidence does establish the fact that said hoist was in a reasonably safe condition and that no repairs thereon were necessary or needed at the time of said accident. That there is no evidence that a failure to properly repair said hoist or to keep the said

hoist in a reasonably safe condition was the proximate cause of the accident.

The defendant further contends that it is alleged in plaintiffs' complaint herein that the defendant had been negligent and had failed to use reasonable care in this, that the said defendant had failed to furnish the deceased with a reasonably safe place for the performance of the duties required of him, had failed to furnish the deceased with proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him in that the bolts, lugs, or keys by which the clutch was fastened to the shaft of the drum of said hoist were loose, worn out, unsafe and inadequate, and that the brake band and clutch on said hoist were worn out, loose, inadequate and unsafe and that said clutch and the band thereof could not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist and prevent the same from attaining a dangerous rate of speed, and that the hoistman, Joe Egbert, was incompetent, inexperienced, nervous and excitable, and that the State law was violated in that the shaft into which the deceased was being lowered at the time of his said accident was more than two hundred and fifty feet in depth and was not equipped with a mine cage, skip, or bucket fitted with safety clutches, and that the cage was being lowered at a greater speed than six hundred feet per minute in violation of the State law, and that a copy of said State law was not posted on the gallows frame, or in

any other conspicuous place at or in said mine, and that the defendant had failed to promulgate reasonable and adequate hoisting rules and regulations; that there is no evidence that the defendant failed to furnish the deceased with a reasonably safe place for the performance of the duties required of him or that it failed to furnish the deceased with proper, safe, suitable, and adequate machinery, tools and appliances for the performance of the work required of him, or that the bolts, lugs, or keys by which the clutch was fastened to the shaft of the drum of said hoist were loose, worn out, unsafe, or inadequate, or that the brake band or clutch on said hoist were worn out, loose, inadequate, or unsafe, or that said clutch and the band thereof could not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist and prevent the same from attaining a dangerous rate of speed, or that the hoistman, Joe Egbert, was incompetent, inexperienced, nervous, or excitable, or that said shaft was not equipped with a mine cage, skip, or bucket, fitted with safety clutches, or that the cage was being lowered at a greater speed than six hundred feet per minute, or that a copy of the State Mining Laws was not posted upon the gallows frame, or in some conspicuous place at or in said mine, or that the defendant had failed to promulgate reasonable and adequate hoisting rules and regulations; but on the contrary the evidence does affirmatively show that the defendant had furnished the deceased with a reasonably safe place to work and had furn-

ished deceased with proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him, and that the bolts, lugs, and keys by which the clutch was fastened to the shaft of the drum of said hoist were safe and adequate and that the brake band and clutch on said hoist were safe and adequate and that the control of the speed of said hoist could be regulated by the lever under the control of said hoistman, and that the hoistman, Joe Egbert, was competent and experienced, and that said shaft was provided with a bucket fitted with safety clutches, and that said bucket was not lowered at a rate of speed in excess of six hundred feet per minute, and that defendant had promulgated proper and reasonable hoisting rules and regulations.

The defendant further contends that it is undisputed that the proximate cause of the accident to the deceased was the loosening, and the failure to tighten, the nut upon the clutch bolt upon said shaft; that if the loosening thereof and the failure to tighten the said nut was the act or omission that would constitute negligence, that it was not the negligence of the defendant, but was the negligence of a fellow servant, or fellow servants, of the deceased, for whose negligence the defendant is not liable.

The defendant further contends that the proximat cause of the accident to the deceased, as hereinbefore particularly mentioned, was not the act or omission, or a failure on the part of the defendant to discharge its duty toward the deceased, which

was pleaded, or mentioned, or relied upon by the complaint of the plaintiffs in this action.

The defendant further contends that the verdict in this cause is excessive and that it is the verdict of passion and prejudice, rather than of a consideration of the evidence in the case; that it was disclosed by the evidence that the deceased was thirty-seven years of age at the time of his said accident; that under the evidence in this case the plaintiffs by the death of the deceased could not have been injured in dollars and cents over the sum of Five Thousand ($5000.00) Dollars, and that if the plaintiffs were under any view of the evidence entitled to a verdict such verdict should not have been in a sum exceeding Five Thousand ($5000.00) Dollars.

This petition is made upon the pleadings and papers on file and upon the minutes of the Court and the evidence of all of the witnesses, and of all of the proceedings in this case, and upon any bill or bills of exceptions which may hereafter and before the hearing of this petition be filed herein.

JAMES A. WAYNE,
Attorney for Defendant.

Service of the within and foregoing Petition for a New Trial is hereby admitted and receipt of a true copy thereof acknowledged this 21st day of December, A. D. 1916.

PLUMMER & LAVIN,
THERRETT TOWLES,
Attorneys for Plaintiffs.

Endorsed: Filed Dec. 26, 1916.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

OPINION ON PETITION FOR NEW TRIAL

DIETRICH, *District Judge:*

I have examined with painstaking care the elaborate and able brief presented upon behalf of the defendant in support of its petition for a new trial. It is unnecessary to notice a number of the points discussed, for at the trial they were ruled, and they still must be ruled, in its favor. Without discussion, it must be conceded that, as stated in the defendant's brief, "if the plaintiff is permitted to finally recover in this case it must be upon the theory that the defendant failed in the discharge of its duty to furnish the deceased with reasonably safe instrumentalities, and failed to keep said instrumentalities in reasonable safe condition and repair, and failed to properly inspect the same." While in their complaint the plaintiffs set forth numerous particulars in which the defendant was negligent, the cause was finally submitted to the jury upon a very narrow theory. The instructions may be justly subject to the criticism that they were longer than necessary, but in effect the jury was told that the plaintiff could recover only in case it was found that the defendant is chargeable with the negligent failure upon the part of one of its employes to readjust a screw upon the hoist clutch which had been loosened for the purpose of rewinding the cable. It cannot be questioned that the failure to tighten the screw before using the hoist constituted negligence on the part of someone, and the controlling, if not substantially the only

question, therefore, was, whether in fact and in law the defendant was responsible therefor. This question of fact was submitted to the jury, under instructions which were summarized in the statement made to the jury after my attention was directed to certain particulars in which counsel for the defendant deemed the original instructions to be either ambiguous or erroneous, as follows: "If you find from the evidence that the witness Lytton, who was the hoist man upon the shift immediately preceding Egbert, and Egbert were under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that the deceased, and other pushers, as they are called, that is, occupying the same position that he did, with other shifts or crews, and you further find that Witkouski, the deceased, and other pushers, had no authority over or right to give orders to or direct said hoist men as to matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and that said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that such conduct on his part was negligence contributing to or causing the injury, and his act in so leaving the screw and failing to notify Egbert constituted the proximate cause or contributed to the death of the deceased, then you should find for the plaintiffs, unless you further find that Witkouski knew or had reason to believe in the exist-

ence of the mechanical conditions which did exist, and which constituted the defective condition of the hoist, and was further able to appreciate the risk incident to such condition, and notwithstanding such knowledge or information, and such ability to appreciate the risk, attempted to ride down upon the bucket, when the hoist was in such defective condition." It will be noted that it was expressly explained to the jury that even though it should be found that the defendant was chargeable with negligence relative to the loose screw, still, if Witkouski had knowlledge thereof and was able to appreciate the risk incident to such condition, and, notwithstanding such knowledge or information, attempted to use the hoist, the plaintiffs could not recover. One of the grounds upon which the defendant now seeks a new trial is that the deceased was chargeable with such knowledge. It appears that his shift went on duty before the preceding shift had entirely completed the rewinding of the cable, and, at his suggestion, he and his crew completed the job, and if he knew or had reason to believe that the screw holding the clutch had been loosened for the purpose of rewinding the cable and had not been tightened again, the plaintiffs could not recover. But upon a re-examination of the record I am still satisfied that this was a question for the jury. There is no positive or direct evidence that the deceased knew that the screw had been loosened. One witness, Moran, testified that he and his crew had themselves on other occasions unwound and re-coiled the cable, but that fact does not necessarily imply such knowledge.

Lytton testified only that the cable had been rewound once on Witkouski's shift. Whether or not he participated in the process is left to inference. It is further stated in the brief that the deceased knew that it was customary to loosen the clutch bands by unscrewing the nut for the purpose of rewinding the cable, but there is no substantial evidence to support such a statement. The testimony of Lytton is again relied upon. He was asked: "Q. And was it always customary to loosen that clutch to do that? A. Yes, sir, it was. Q. Did Witkouski know of that fact? A. I suppose so. I couldn't tell you whether he did or not." Such an answer does not constitute competent evidence. It is further contended that Lytton, whose shift immediately preceded that of Witkouski, and under whose direction the screw was loosened, told the deceased, when the shifts were changed, that he had loosened the clutch, but there is no substantial evidence to support such claim. When upon the witness stand Lytton expressly stated that he did not so tell the deceased, and when asked the question which counsel for the defendant asked him for the purpose of laying the foundation for impeachment, whether he had not so stated to Sherman Gregory at a certain time and place, he testified that he did not recollect having made such a statement. To be sure, Gregory testified that he did make the statement, but even so the very most that could be claimed for Gregory's testimony is that it neutralizes Lytton's positive testimony to the effect that he had not told Witkouski

of the loosening of the clutch, and therefore at most the record is without any evidence one way or the other upon the point. Upon cross examination of the witness Moran, counsel for the defendant sought to show direct knowledge on the part of Witkouski of the loosened clutch, but again the evidence falls short. The witness testified: "Q. And you in connection with Witkouski and the other men on your shift had on other occasions re-coiled the cable on the drum, had you not? A. We had. Q. And it it was customary and proper, when you were re-coiling the cable, to first loosen the clutch, so as to pull the cable off without pulling against the clutch, isn't that correct? A. That I don't know. Q. You don't know whether they would or not? A. No. Q. When you went on shift did you hear either Jacobson or Lytton tell Witkouski that they had loosened the clutch? A. No." The testimony as a whole barely presents sufficient evidence from which the jury might draw the inference that Witkouski, coming on duty before the process of re-winding the cable had been finished, knew or had reason to believe that the clutch had been loosened. But it is only a possible,—surely not a necessary,—inference. The screw was loosened by the hoist man and not by the "pusher" (Witkouski), or the men more directly under his control. It is not clear that there is any general custom, for if the testimony of some of the witnesses is to believed ordinarily it is unnecessary to loosen such a screw, it being required in this case only because the shaft of the drum was defective. But in-

sofar as there is a common practice, it is abundantly shown that the duty of loosening and tightening the screw rests upon the hoist man. Hughes, the defendant's master mechanic expressly so testified and he further stated that the screw should be tightened again before the cable is re-wound. It might very well be, therefore, that the deceased was without knowledge of what the hoist man did to release the drum or at what stage of the process of rewinding the cable, readjustment of the clutch or the clutch screw was made. Plainly if Witkouski was familiar with the mode of procedure testified to by Hughes he had a right to assume, and naturally would assume, when he went on duty and found that the cable had been partly re-wound, that the clutch screw had again been tightened. The burden was upon the defendant to establish its charge of contributory negligence, and, to say the least, the evidence is insufficient to warrant a preemptory instruction for the defendant, and the instructions given were therefore as favorable to it as the evidence warranted.

It is further contended that the accident was due to the careless operation of the hoist by Egbert, the hoist man who went on duty at the same time with the deceased. It may be admitted that while Egbert was engaged in operating the hoist he was a fellow servant with the deceased, and if his negligence was the proximate cause of the accident the plaintiffs could not recover. But the defendant did not try the case upon this theory. It pleaded certain affirmative defenses, but nowhere did it allege that

the accident was the result of the negligence of Egbert, and that he being a fellow servant with the deceased the plaintiffs could not recover. No instruction was requested defining such theory for the jury, and the instructions given were not excepted to in that respect. If my memory is not at fault, in the argument to the jury the defendant conceded that the accident was due to the fact that the clutch did not properly function. I stated to the jury that such was the defendant's concession, and repeated the statement, but no objection was made or exception taken, and surely if the defendant had been then contending, as it now contends that Egbert's carelessness in operating the hoist was the proximate cause of the accident, objection would have been made and exception taken to an instrument so obviously erroneous and prejudicial. Possibly if we were to disregard the failure of the defendant to plead such defense, the question of Egbert's negligence was sufficiently presented by the evidence to warrant a submission thereof to the jury, and it probably would have been submitted as a matter of course had the concession already referred to not been made and had request for a proper instruction been presented. It may be that a jury could find that he did not exercise a reasonable degree of vigilance and care. But at most it is a mere question for the jury; no one could say that it conclusively appears that he was negligent, and that such negligence was the proximate cause of the accident, and that therefore the verdict is against the law or that the evidence is insufficient to support the verdict.

The most favorable view to the defendant that can be taken is that, with a proper pleading and upon seasonable request, an instruction should have been given submitting the question to the jury as to whether or not he exercised proper care in handling the hoist, and, if not, whether his negligence was the proximate cause of the accident. But granting that it is sometime within the sound discretion of the court to grant a second trial, for the purpose of enabling a party to try a case upon a new theory, I do not think I would be warranted in exercising such extreme discretion in favor of the defendant in this case, for the reason that there is not, in my judgment, good ground to expect that if the answer were amended so as to plead such a defense, and if upon the present record, the question were clearly and distinctly submitted to a jury, under proper instructions, the finding would be in favor of the defendant. The granting of a new trial, therefore, upon such a ground, would be an improvident exercise of judicial discretion.

It is further urged that error was committed in adopting the theory, and in instructing the jury, that in re-winding the cable and in the operations necessarily incident thereto the defendant's servants, while so engaged, whatever may have been the nature of their general employment, were acting for the defendant in the performance of its non-delegable duty to furnish to its employes reasonably safe instrumentalities with which to carry on their work. This point was fully considered during the course of the

trial and I have no disposition to recede from the conclusion then reached. The deceased and the men under his direction were engaged in sinking a shaft. The hoist was a mere instrumentality furnished to them, by means of which they were to carry on the work. At the time of the accident they were being conveyed by it to the place where they were doing their work. Under the direction of the master, the preceding crew had undertaken to re-wind the cable, for the purpose of taking the kinks out of it, and thus prolonging its life. Before the deceased could use this indispensable instrumentality he and his crew completed the re-winding of the cable; the service thus performed was entirely aside from the line of their general duty. While they and the preceding crew were so employed they were all acting for, and in the place of, the defendant. And as to the particular service which was negligently performed in this case it is too clear to admit of discussion that the hoist man was a vice-principal. The master mechanic testified that when it became necessary to take kinks out of the cable it was the hoist man's duty to loosen and tighten the clutch screw. His legal status while so acting was precisely the same as if he had been sent directly from the mechanical department; he was not operating, but mending, the device. It was his duty to loosen the screw, unwind the cable, again tighten the screw, and then re-wind the cable. In this case the defendant, acting in the person of Lytton, the hoist man, loosened the screw, and then negligently failed to tighten it again before

starting to re-wind the cable. Witkouski, coming on duty before the cable was fully re-wound, completed the process, and, being ignorant (so the jury found) of the failure of the defendant to readjust the clutch, got upon the bucket and gave his hoist man the customary signal. The bucket descended with increasing speed until, becoming alarmed, and fearing that the hoist was beyond control, he jumped to save himself, but, missing the cross timbers, fell to his death. In so doing, the jury found, he did not act unreasonably. It must not be understood that I hold that employes are necessarily not fellow servants when they are in different departments. The contrary may be the case. But here the mechanical department performed the non-delegable duties of the defendant, and therefore the phrase is used for convenience. Whether there was or was not such a department, when Lytton was directed to and did engage in the repair of an instrumentality, he became a vice-principal. Defendant cites with apparent confidence *Quebec Steamship Co. v. Merchant*, 133 U. S. 375. But the apparent relevancy of the case lies in the fact only that the servant who was negligent was called a "carpenter." But the duty he negligently performed was not that of a carpenter at all, but of an attendant or porter. He was an operative only, and was not repairing or inspecting the ship. In no sense was he a vice-principal. It is not what an employe is called, but the nature of his service, that fixes his status.

Finally it is suggested that if in rewinding the cable Lytton was acting in the mechanical department, so also was the deceased and the other members of his crew, and therefore they were all fellow servants. But even if it could be held that under the circumstances of this case the deceased and Lytton should be deemed to be fellow servants during the time the cable was being readjusted,—a point I do not decide,—it is sufficient to observe that when he was killed Witkouski was no longer in the mechanical department; he was not repairing an instrumentality, but was using it for the purpose for which it was designed. He had become an operative, and was engaged in the performance of his general duties as such. It would be as reasonable to say that a locomotive engineer could not recover for an injury received in a wreck of his train due to a faulty repair of his engine, because, before starting, he had given the mechanics some slight assistance in making the repair. Of course, if the engineer himself had, through his own carelessness, been responsible for the defective repairs, or if he had knowledge thereof, other considerations would be involved, but we are not considering only the effect upon the plaintiffs' rights of the fellow-servant rule which the defendant invokes.

The petition for new trial must therefore be denied and such will be the order.

Filed April 9, 1917,

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 657.

ORDER DENYING MOTION FOR NEW TRIAL

This cause coming on to be heard before the court on Defendant's Motion for New Trial, and to set aside the verdict of the jury in said cause, and after hearing said Motion, and a consideration of the same by the court,

It Is Ordered, Adjudged and Decreed, that defendant's Motion to set aside the verdict of the jury, and to grant a new trial in said cause, be and the same is hereby denied.

Done in open court this 12th day of April, 1917, A. D.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed Apr. 13, 1917,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 657.

PRAECIPE

To the Honorable W. D. McReynolds, Clerk of the Above Entitled Court:

Will you kindly prepare and have printed, according to the laws of the Circuit Court of Appeals for the Ninth Circuit, a Supplemental Transcript in the above entitled cause, containing defendant's petition or Motion for New Trial, and the Opinion of the Court filed therein, and also the order of the court

denying said motion, and certify the same as a Supplemental Transcript, showing the cost of preparing and having printed said supplemental record, also to contain this Praecipe, and when so printed and certified, kindly transmit the same to the Clerk of the Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, according to the rules of said court, as to the number of copies, etc.

Kindly advise me the amount of the expenses and we will remit at once.

Dated at Spokane, Washington, this 23d day of June, A. D. 1917.

PLUMMER & LAVIN,
Spokane, Washington.
THERRETT TOWLES,
Wallace, Idaho.
Attorneys for Plaintiffs.

Filed June 27, 1917,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 657.
CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing supplemental transcript of pages numbered from 1 to 29, inclusive, to be full, true and correct copies of Petition for a new trial, Opinion on petition for a new trial, Order denying motion for new trial, Praecipe for supplemental

transcript, and Clerk's certificate, and that the same is supplemental to the original transcript and prepared in accordance with praecipe of the Defendant in Error, filed herein.

I further certify that the cost of the record herein amounts to the sum of $39.50, and that the same has been paid by the Defendant in Error.

Witness my hand and the seal of said court this 2nd day of July, 1917.

W. D. McREYNOLDS,
Clerk.

(SEAL.)